

Charitable Bequests and the Federal Estate Tax: Proposed Restrictions on Deductibility*

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I want this evening to discuss with you an important proposed amendment to the federal estate tax law, under which the deduction allowed for charitable bequests—now unlimited in amount—would be limited to a specified percentage of the testator's estate. The most frequently mentioned figure is 50 per cent. Similar proposals to emulate the income tax by imposing a percentage limit on the deduction of charitable contributions have been floated from time to time for at least 35 years,¹ but recently these trial balloons have attracted more attention on Capitol Hill than ever before.² By itself, the issue is a narrow one, affecting only a small fraction of estates; but I propose to show that it raises fundamental issues about the nature and objectives of death taxation and that, on analysis, the proposal for a percentage limitation turns out to rest on a faulty foundation. This analysis also exposes parallel shortcomings in the rationale underlying several other proposed changes, such as converting the deduction into a tax credit or substituting a system of matching federal grants to charitable institutions.³

I. THE ORIGIN AND HISTORY OF THE DEDUCTION

First, a brief historical narrative.

When Congress turned to death taxes as a source of federal revenue in 1916 (as it had in 1797 when war with France seemed possible and again in 1862 and 1898⁴), it granted no exemption

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for bequests to charity. The legislative history of the 1916 law is meager, and we are left to speculate about the reason for the failure to grant charities an exemption that was almost universal at the time in state inheritance laws.⁵ Perhaps the explanation may be found in the difference in theory between the typical state inheritance tax and the much less common estate tax that Congress chose to enact in 1916.⁶ The legal structure of an inheritance tax focuses on the decedent's beneficiaries, who are customarily grouped into several categories, depending on the closeness of their relationship to the decedent. Bequests to the most favored group (the widow or widower and children) ordinarily qualify for generous exemptions and relatively modest rates, while bequests to more distant relatives and "strangers" get less generous exemptions and are subjected to higher rates. Since it directly reduces the amount received by the heir or legatee, an inheritance tax on charitable bequests is readily perceived as a burden on the charitable institution and its beneficiaries; and this perception, in turn, virtually invites a legislative exemption of such bequests lest the institution's charitable functions be curtailed.

By contrast with typical state inheritance taxes, the 1916 death tax imposed by Congress looked to the aggregate estate left by the decedent, rather than to the separate amounts passing to the heirs and legatees. This legislative decision to enact an estate tax contributed to simplicity, by avoiding the necessity of classifying recipients into a number of categories; and this in turn sidestepped the valuation problems created by testamentary trusts whose ultimate recipients are not known at the date of death and may eventually fall into any of several categories, depending on the way the trustee subsequently exercises discretionary powers or other postmortem events.⁷ But the very fact that the federal estate tax would be the same whether the estate went to the decedent's children, collateral relatives, or friends, as well as the fact that the identity of the recipients might not be known for many years, tended to divert attention away from these persons, as though the burden of the tax fell not on them, but on the decedent. The status of charitable bequests, therefore, may have been over-

looked by the draftsmen of the 1916 law in their preoccupation with the size of the estate as such; or they may have viewed an exemption for bequests to charitable legatees as inconsistent with the basic concept of a tax on the estate as a whole.

Whatever the reason for failing to exempt charitable bequests in 1916, this omission was quickly remedied. In 1918 Congress enacted a deduction for charitable bequests⁸ that has remained substantially intact to this day. According to Dean Griswold, this change in the law occurred "almost by accident."⁹ (Dean Griswold's characterization was probably not intended as praise, though no doubt some disenchanted observers of Capitol Hill might argue that legislation by accident is sometimes better than legislation by plan.) In point of fact, however, the deduction may owe its origin to something more rational than accident.

As passed by the House of Representatives, the Revenue Act of 1918 reenacted the 1916 estate tax with substantial amendments, including a more steeply graduated rate schedule, but the Senate, following the recommendation of the Senate Finance Committee, substituted an inheritance tax.¹⁰ As the Senate committee pointed out, under the 1916 federal estate tax, a person receiving a bequest of a given amount from a large estate bore a heavier burden than a person receiving a bequest of the same amount from a smaller estate; by shifting to an inheritance tax based on the size of the individual share, Congress could equalize their burdens and thus achieve, in the committee's opinion, a "fairer and more equitable" result.¹¹ The Senate substitute included an exemption for charitable bequests, seemingly patterned on the exemption in typical state inheritance tax laws. When the bill went to conference to resolve this head-on collision between the House's estate tax and the Senate's inheritance tax, the conferees recommended retention of the 1916 estate tax structure but with higher rates, an exemption for charitable bequests, and a few other changes.¹²

This bit of legislative history suggests that when the congressional committees focussed on the status of the beneficiary, who after all must bear the burden of any death tax—the decedent being henceforth concerned with less mundane matters—they may

have concluded that equity was better served by exempting, rather than taxing, amounts destined for charitable uses. If the beneficiaries of a charitable bequest are persons on the lower rungs of the income ladder, their meager ability to pay strongly suggests that an exemption is preferable to a tax on their share of the estate.¹³ Even if the beneficiaries of the bequest are not indigents, but members of the general public, as would be true if the bequest is to a college, museum, or similar institution, their average economic status is almost certainly lower than that of typical recipients of federally-taxed bequests. For this reason, an exemption of charitable bequests that inure to the benefit of run-of-the-mine citizens is, in my view, completely harmonious with the spirit of the federal estate law.

We cannot know for sure whether these considerations were present in the minds of the legislators when they added the deduction for charitable bequests to the Revenue Act of 1918. The record does establish that the Senate Finance Committee recognized the “ability to pay” issue indirectly, when it noted the unfairness of taxing two bequests of the same amount at different rates simply because one came from a larger estate than the other. (The point of this criticism was that in judging the fairness of death taxation, we should look at the living person who gets the bequest, not at the dead person who left the property.) It seems entirely possible that the conferees were unwilling to correct this undesirable aspect of the 1916 estate law by shifting to an inheritance tax for any of a number of reasons—the simplicity of an estate tax, a potential loss of revenue during wartime, the fact that wills may have been drafted and estates planned on the assumption that the 1916 law would remain on the books, etc.—but that they accepted the inheritance tax approach in the limited area of charitable bequests because the injustice of taxing these transfers was especially apparent.

Whatever the reason, the deduction was enacted as part of the Revenue Act of 1918¹⁴ and has been retained by Congress throughout the ensuing years with remarkably few changes. Indeed, if a member of the Congress that enacted the Revenue Act

of 1918 were to peruse today's Internal Revenue Code—a harsh interruption, to be sure, of his eternal rest—he would find few provisions that preserved his work as faithfully as §2055. There have been, in fact, only two changes of consequence, both designed to limit or deny the deduction if the bequest may be diverted from the purported charitable beneficiary.¹⁵

II. THE PERCENTAGE LIMIT ON THE INCOME TAX DEDUCTION FOR CHARITABLE CONTRIBUTIONS

From the outset, the deduction has been unlimited, in the sense that a charitable bequest, no matter how large, qualifies for deduction, so that no federal estate tax is payable if the entire estate is left to charity. Section 2055's income tax counterpart, however, was restricted to 15 percent of the taxpayer's income when it was enacted in 1916; this ceiling has been repeatedly raised and now stands at 50 per cent of adjusted gross income.¹⁶ Although Congress eliminated the ceiling in 1924 for taxpayers donating substantially all of their after-tax income to charitable purposes (a tiny group), in 1969 this exception was repealed, subject to a transitional period of gradual phase-out.¹⁷ Thus, the percentage limit has been a basic feature of the income tax since the inception of the deduction in 1916.

The contrast between the limited income tax deduction and the unlimited deduction allowed for federal estate tax purposes has not gone unnoticed. As long ago as 1940, in his casebook on federal taxation, Dean Griswold asked:

Would a maximum limit on the amount of charitable gifts allowed as deductions [for federal estate tax purposes] be desirable? Cf. section 23(o) of the income tax.¹⁸

I find that in the 6th edition of his casebook, published in 1966, Dean Griswold asked exactly the same question, and continued to refrain from supplying an answer.¹⁹ I mean no criticism; as a teacher, I can testify that when a question succeeds in stimulating class discussion, it should be preserved with care, and protected against erosion by those who want to see their answers in print.

Nothing casts a pall on a classroom like a student who has read the teacher's law journal article on a subject of discussion and then proceeds to regurgitate it.

One of Dean Griswold's colleagues, however, has addressed himself to the question (though not, to be sure, until after the Dean's departure from academic life). In his 1971 Hess lecture before this Association, Professor Westfall suggested "that we may no longer be able to afford the luxury of an unlimited charitable deduction for estate tax purposes," and he recently fleshed out this comment by recommending that the deduction be limited to 50 per cent of the estate.²⁰ As I have already suggested, I disagree with this proposal.

The best point of entry into the issue before us is the income tax's percentage limit on the deductibility of charitable gifts, since this is sometimes held up as a model, the absence of such a limit from the federal estate tax being viewed as an anomaly that calls for legislative correction. Why does the income tax contain a percentage limit on the deduction of charitable gifts and are these reasons equally applicable to the federal estate tax? Unfortunately, the Congressional committees did not announce their reasons for recommending enactment of the percentage restriction in 1916, nor has this lacuna been filled in the subsequent years, despite the repeated amendments that have expanded §170 from two brief sentences in the Revenue Act of 1916 to 14 pages of turgid prose in its 1975 counterpart. Moreover, the percentage limitation has not evoked any significant body of speculation or discussion from tax theorists and commentators.

The simplest explanation for the restriction, that it was enacted to prevent a loss of revenue, is not persuasive. The number of persons who give as much as the deductible limit, or who even exceed the biblical tithe, is small; if Congress was ever seriously concerned about a potential drain on the Treasury from an unlimited deduction, that fear should have been allayed long ago by the statistics.²¹

Perhaps the restriction stems, at least in part, from a feeling that taxpayers get satisfactions from their charitable contributions that resemble the pleasures derived from hobbies, vacations, cul-

tural activities, and other personal uses to which they may put their income. In exercising his command over income by making a charitable gift, the taxpayer is sometimes said to get a kind of "psychic income" in the form of personal pleasure and public fame that should not be disregarded in determining his tax liability, even though it cannot be given a precise dollar value. Critics of existing law, indeed, sometimes argue that charitable gifts are simply a form of personal consumption that is no more entitled to a deduction than ordinary expenditures for the cost of hobbies and other personal activities.²² Other tax theorists are not prepared to go this far, however, because they perceive a "selfless" element in charitable gifts distinguishing them from expenditures for hobbies and other personal activities. But if they also perceive an element of psychic income in charitable gifts, they may wish the tax law to reflect both of these perceptions.

As a device to take simultaneous account of the selfless element and the psychic income in charitable gifts, however, the percentage limit is a crude instrument. Up to the amount of the limit, the selfless element gets full sway, since the deduction is not reduced by any psychic income; on the other hand, amounts above the limit generate no deduction for the donor's generous impulses, implying that they are totally eclipsed by his psychic income. A remedy that would be more suited to the foregoing analysis of the psychological foundations of charitable gifts would be a deduction limited to a specified percentage of each donated dollar.

Another argument that is sometimes offered in support of the income tax's percentage limitation is that in its absence, taxpayers would be able to avoid paying any income tax, no matter how great their income, if they were prepared to donate the entire amount to charity. Since these taxpayers would continue as citizens to enjoy the benefits of the federal government's programs—and not necessarily as ascetics, since they might maintain an expensive standard of living by dipping into capital or using tax-sheltered receipts²³—this freedom from tax liability, it may be argued, is objectionable.

In 1969, this was the rationale offered by the Senate Finance

Committee when it recommended repeal of the unlimited charitable deduction that had entered the income tax law in 1924:

The committee does not believe that high-income taxpayers should be allowed to significantly minimize or completely avoid tax liability by means of the charitable contribution deduction. Accordingly, the committee agrees with the House that the unlimited charitable contribution . . . should be repealed. The effect of this . . . is that charity can remain an equal partner with respect to an individual's income, but the charitable contributions deduction no longer will be allowed to reduce an individual's adjusted gross income by more than one-half.²⁴

These reasons for limiting the deduction for charitable contributions in computing income tax liability—the “psychic income” derived by the donor from such contributions and his continued enjoyment of the benefits of government—are not entirely persuasive. “Psychic income” comes from many sources, but for sound reasons, Congress has never sought to tax it; if emotional satisfaction from one's activities generated taxable income, people like Ralph Nader, William Buckley, Kenneth Galbraith, and Ronald Reagan might have to pay more than John Paul Getty, who seldom looks—at least to this observer—as though he enjoyed his wealth.

Finally, the principal other rationale for the percentage limit (viz., the duty-to-support-the-government argument) presupposes that the benefit of the tax deduction inures to the donor rather than to the donee. But this premise, in turn, rests on still another assumption, viz., that charitable bequests are unaffected by the deduction. If this assumption is invalid, and charitable bequests would be reduced if they were taxed, the unlimited deduction of existing law inures *pro tanto* to the benefit of the charitable donees rather than the donor. Seen in this light, the deduction appears to relieve charitable institutions and their beneficiaries of the cost of supporting the federal government. The wisdom of this policy may be debated, but its impact is certainly alto-

gether different from relieving the *donor* of the burden of supporting governmental services.

III. *SHOULD THE PERCENTAGE LIMIT BE EXTENDED
TO THE ESTATE TAX DEDUCTION?*

Notwithstanding these misgivings about the percentage limitation on the income tax deduction for charitable contributions, I am prepared to accept it *arguendo* as an embodiment of wise policy. Even on this assumption, I see no case for extending it to the federal estate tax. So far as psychic income from charitable bequests is concerned, the decedent has left us, and this being a secular society by virtue of the First Amendment, we should not base our legislation on the assumption that he will enjoy the psychic income of a happier hereafter because of his charitable bequests. It is occasionally suggested that death taxes should be viewed as the final installment on a debt to society that was not fully discharged by the payment of taxes during life, but this rationale collides with the fact that nothing will be due if the taxpayer spends all he has before death. What kind of a final reckoning is it that can be so easily evaded and that falls only on those who refrain from such extravagance?

Sense can be made of the federal estate tax, in my opinion, only if we disabuse ourselves of the primitive notion that the decedent "pays" the tax. The decedent, I make bold to suggest, leaves this world with nothing, whether the tax is high or low; it is the living persons whom he leaves behind who will enjoy the benefits of his assets and bear the burden of the death tax. The tax, therefore, should take account of *their* circumstances.

To be sure, the legislative decision to impose an estate tax sets limits to the achievement of this objective. To avoid valuing every potential beneficiary's interest in the estate, the federal tax is imposed on the entire estate; the inevitable cost of this simplicity in administration is that the rate of tax cannot be geared to the separate financial situations of the individual legatees. In effect, they are all taxed at an average rate—but it ought to bear a

reasonable, even though rough, relationship to their ability to pay.²⁵

Many tax theorists favor changes in the death tax area that would refine this relationship, by tailoring the tax more closely to each legatee's personal circumstances. Thus, some favor taxing gifts and bequests as income; others propose an accessions tax; and there are still other ways to "individualize" the death tax.²⁶ But this can be done to some extent even within the constraints of a conventional estate tax. The marital deduction is one such element in the federal estate tax, based on the theory that amounts inherited by a surviving spouse should not be taxed as heavily as transfers to other persons. A similar theory underlies recent proposals to exempt bequests to the decedent's minor children or other dependents up to a specified amount (e.g., an exemption for each child of \$5,000 times the number of years remaining before attaining adulthood).²⁷

The deduction for charitable bequests has a similar function. Far from being an anomaly in the federal estate tax structure, it is, I submit, an appropriate—indeed admirable—device to tailor the tax to the beneficiary's ability to pay. In recent years, only about 9 per cent of decedents left estates large enough to require filing a federal estate tax return,²⁸ and almost a third of these were nontaxable.²⁹ A rate structure designed for the children and other legatees of this tiny upper crust of American society would be grossly disproportionate if imposed on bequests to social welfare organizations, educational institutions, and other charitable groups, whose beneficiaries are drawn almost entirely from much lower income levels. If the decedent leaves his country estate to a charitable organization to be used as a summer camp for children of the ghetto, should the transfer bear the same tax as a bequest of the same property to the decedent's children for their personal use? Judged by their taxpaying capacities, these two groups are as different as night and day. By permitting charitable bequests to be deducted, existing law tacitly, but unmistakably, acknowledges that there is a difference between the beneficiaries of charitable bequests on the one hand, and the members of the

decedent's family who receive the bulk of non-charitable bequests on the other. Only by disregarding the obvious can one conclude that the deduction for charitable bequests is a tax loophole, rather than a sensible way of adjusting the rate structure to the realities of life.

When the death tax is viewed as a tax on the recipients of bequests rather than on their deceased benefactor, it becomes evident that the proposed percentage limitation on the charitable contribution deduction would be similar to an income tax on charitable institutions, based on the bequests they receive. The income tax treatment of charitable organizations has been subjected to much criticism in recent years, leading to numerous legislative changes and even more proposals; but to the best of my knowledge, no responsible commentator has ever recommended that contributions should be taxed to the charitable recipient. Yet this is exactly what would happen, albeit somewhat indirectly, if the federal estate tax were amended to restrict the deduction for charitable bequests.

In saying this, I am, of course, assuming that imposition of a percentage limitation would in fact reduce the amount received by charity. If the entire estate is left to charity, this assumption is obviously valid, since only $\frac{1}{2}$ would be deductible, and there is no other source from which the tax on the balance could be paid.³⁰ If there are other bequests, the effect of a percentage limit is slightly more problematical, but the result is, in my opinion, likely to be similar. Assume, for example, that under existing law a testator plans to leave 20 per cent of his estate to friends or relatives, and the balance, after taxes, to a charity. Assume also that under existing law this plan would result in transmitting 20 per cent to the noncharitable legatees, 5 per cent to the government as taxes, and 75 per cent to the charity. What changes would the testator be likely to make if the law were changed so that the charitable bequest could be deducted only in part—up to 50 per cent of the estate? Assume that the hypothetical change in the law would increase the federal estate tax from 5 per cent to 20 per cent of the estate—an increase of 15 per cent. Would the testator

be likely to cut back the noncharitable bequests by this amount, giving the donees only 5 per cent of the estate rather than the 20 per cent they were to get under the original plan? Or would he be more likely to throw most or all of the entire burden on the charity? The latter seems by far the more likely outcome.

Indeed, he might decide to cut back the charitable bequest by *more* than the amount of the added tax. Under existing law, the unlimited deduction is an inducement to make such bequests: the charity gets more than the testator's other heirs lose. Under the proposed change, however, there is no tax incentive to give more to a charity than can be deducted; the tax result will be the same whether the additional dollars are given to the charity or to the testator's friends and relatives. For this reason, the testator may well be impelled to cut the charity back to the deductible 50 per cent, leaving the balance after taxes to the noncharitable heirs. If this is his reaction, an increase in the tax of 15 percentage points would cause a reduction in the charitable bequest of 25 percentage points. The noncharitable heirs would then get 30 per cent of the estate, rather than the 20 per cent that they would have received under the original estate plan.

If these views about the probable impact of the proposed percentage limit are correct, it is objectionable in two fundamental respects: First, it would impose a burden that cannot be justified on "ability to pay" principles. The federal estate tax, by virtue of its \$60,000 exemption, exclusion of most life insurance, and exemption of survivors' benefits under the federal social security system and qualified private pension plans, is a distinctly upper class tax. We do not have any exact knowledge of the economic status of the heirs of decedents leaving estates large enough to be subject to the federal estate tax, but it has been estimated that this tax is paid almost exclusively by families with annual incomes of over \$20,000.³¹ The proposed percentage limitation would be felt almost entirely by the largest estates, where it is a virtual certainty that the typical heirs are very high on the income ladder. Taxing charitable bequests (by imposing a limit on the deduction) will, therefore, apply an estate tax rate schedule

designed for these wealthy taxpayers to charitable institutions and their ultimate beneficiaries whose economic status is utterly different. No matter how vague the "ability to pay" principle may be, we surely know that there is a world of difference between the average heir to a multi-million dollar family fortune and the run-of-the-mine middle and low income citizen who benefits from bequests to universities, museums, community funds, and other charitable institutions.

Second, if we take into account the role of the federal estate tax as a device to moderate the concentration of family wealth—its primary function in the eyes of some theorists; an important secondary function for an even larger group³²—an unlimited exemption for charitable bequests is not only consistent with this role, but actually makes an affirmative contribution to its achievement.³³ By encouraging testators to make charitable bequests, the deduction helps to disperse wealth among a larger group. Indeed, it may outperform the tax itself in this respect, since some testators—as argued above—may reduce their transfers to family members in order to make deductible bequests to charitable institutions. Conversely, if part of the charitable bequest became non-deductible, testators might well prefer, as suggested, to leave more of their property to members of their families, thus increasing, rather than diminishing, the concentration of wealth.

IV. TECHNICAL PROBLEMS

I should now like to turn from the fundamental policy issues to some technical problems that would be introduced into the areas of tax law and estate planning by the enactment of a percentage limitation on the deduction of charitable bequests. For simplicity, I will assume that the prescribed limit is 50 per cent—the same as the income tax limitation.

1. *Charitable bequest formula clauses?* Faced by a percentage limit on the deductibility of charitable bequests, some testators will wish to insure that the federal estate tax attributable to the nondeductible portion does not diminish their other bequests.

This can be done, of course, by including a tax-apportionment clause in the will or by allowing an applicable state tax-apportionment law to take effect.³⁴ Other testators, however, will want to avoid nondeductibility entirely, preferring to transmit the otherwise nondeductible amount to members of the family. If they want to take full advantage of the deduction without exceeding it, the obvious solution will be a charitable bequest formula clause, comparable to the marital deduction formula clauses now used to achieve a similar result.

It is surely unnecessary to stress, before this group, the estate planning complications that would arise from adding another type of formula clause to the lawyer's tool kit. Quite aside from these complexities, it would be deplorable to increase the number of wills that the testator must accept on faith because he cannot be expected to understand what his lawyer has drafted. Moreover, while testators may be willing to accept marital deduction formula clauses on being told that the plan is "good for the family," a testator who confronts a similarly complex formula when a charity is the beneficiary may feel that the complexity smacks of tax avoidance or worse, or presages a field day for the lawyers after his death, and he may then react by cutting back sharply on the bequest itself.

2. *Charitable gifts in contemplation of death.* In applying the proposed percentage limitation on the deduction of charitable bequests, the Code would presumably take into account charitable gifts made in contemplation of death during the last three years of the decedent's life. Although existing law does not exclude charitable gifts from the contemplation of death provision, the issue does not ordinarily arise because inclusion of a charitable gift would simply increase the estate's deduction by the same amount, so the net result would be a wash.³⁵ Under the proposed change, however, an unusually large charitable gift could become part of the gross estate because made in contemplation of death but, because of the percentage limit, not be offset by an equally large deduction. This risk would increase the use of charitable bequest formula clauses by foresighted draftsmen as a way to keep

the aggregate charitable transfers, during life and at death, at or below the percentage qualifying for deduction.³⁶

3. *Carryover of "excess" charitable bequests.* The income tax provision limiting the deduction of charitable contributions, which, as I have said, has inspired the proposed estate tax limit, permits an "excess" contribution to be carried forward for use as a deduction in later years if the taxpayer's gifts fall below the deductible limit.³⁷ A similar carryforward of a disallowed charitable bequest for federal estate tax purposes might be feasible in the case of married couples. If the first spouse to die exceeded the limit and also left a bequest to the survivor, the survivor's estate could be allowed to deduct the excess amount, up to its percentage limit. On the other hand, if the first decedent did not fully use the allowance, the estate of the surviving spouse might be allowed to use the balance, at least against property inherited from the first decedent. Such a carryforward of either an excess deduction or an unused percentage allowance could rest on the theory that each spouse should be treated as owning one-half of the family fortune and as making one-half of their joint charitable bequests, regardless of the actual division of the funds and bequests between them. I cannot envision, however, any other situation in which a carryforward would be warranted or feasible.

4. *Percentage limit in federal gift tax?* A final question, which I list as a technical issue though it has important policy ramifications, is whether the proposed percentage limitation on the estate tax deduction for charitable bequests is to be accompanied by a parallel limit on the deduction of lifetime gifts in computing the federal gift tax. In general, of course, the gift tax was enacted and has been treated as a buttress to the federal estate tax, rather than as an independent tax with significant objectives of its own. Though Congress has not yet been willing to integrate them, the intimate relationship between the two taxes is evidenced by the adoption of the gift tax's split-gift provision and marital deduction in 1948, when the estate tax's marital deduction was enacted, as well as by their parallel treatment of community property from 1942 to 1948. If a limit on the deduction of charitable bequests

is enacted, can a limit on the deduction of charitable gifts be far behind?

Without a gift tax limit as a buttress, the percentage limit on charitable bequests could be avoided by lifetime gifts, unless the donor died within three years and the gifts were thrown into the estate because made in contemplation of death. But a gift tax limit would in turn place great stress on the timing of all lifetime transfers, since a large charitable contribution could be sheltered by large gifts to members of the family in the same year, though it would be taxable if it was made in one year and the family gifts in another.³⁸

To mitigate the rigors of annual (indeed, quarterly) accounting for gifts, a carryforward might be allowed, with a donor who exceeded the limit in one year being allowed a deduction for any later year (or a refund of the prior year's tax) in which his charitable gifts were less than half of his aggregate gifts. Conversely, much could be said for permitting unused allowances to be carried forward from year to year to be used whenever charitable gifts exceeded the allowance that would be permissible for a particular year, rather than to apply the limit year-by-year as though each year were unconnected with the prior period.

Finally, if the long-overdue integration of the federal transfer tax system were achieved, it would imply a correlative integration of the percentage limitation, under which it would be immaterial whether charitable contributions were made during the taxpayer's lifetime or at death. This would require a cumulative computation of all transfers (save for de minimis amounts and exemptions, if any, granted to encourage early gifts), with the percentage limitation becoming effective if—but only if—the aggregate charitable gifts during life and at death exceeded the applicable percent of all transfers. If there had been a temporary excess resulting in a transfer tax during the taxpayer's life (e.g., a charitable gift in the first relevant year exceeding that year's percentage limit), the resulting tax would be treated as a down payment on the amounts due for later years and eventually at death (and refunded if necessary) if the charitable gifts were below the limit when cumulated over the taxpayer's lifetime.

CONCLUSION

In conclusion: The last few years have been a difficult period for charitable institutions; social needs have increased; contributions have suffered from the recession; and the legislative climate, especially as respects taxes, has been chilly. Unquestionably there were abuses that cried out for Congressional remedies, but just as certainly there have been remedies that went too far.³⁹ I have discussed only a small corner of this troubled area, but my principal point—that the burden of death taxes falls not on the decedent, but on the persons and institutions who survive the decedent—has much wider ramifications and, though simple, is often overlooked. Any proposed change in the tax treatment of charities should, in my opinion, be preceded by an analysis of the ultimate burden of the change. It may then become apparent that the added tax will fall on persons least able to bear it—the beneficiaries of charitable institutions. The limit on the deductibility of charitable bequests is only one of a number of legislative proposals that take on a different complexion when this point is recognized.

FOOTNOTES

¹ Hearings on Revenue Revision of 1942 before the House Committee on Ways and Means, 77d Cong., 2d Sess., 91 (1942) (Statement of Randolph Paul):

Limitation upon deductions for contributions to charity.—Amounts bequeathed or transferred for specified charitable purposes are deductible in computing the estate subject to tax. The statute contains no limitation upon the amount of the deduction for such gifts to charity and thereby affords to wealthy individuals an opportunity virtually to escape all liability under the tax. The provision also enables decedents to perpetuate, through charitable trusts and corporations, family control over their wealth without paying the estate tax. The policy underlying the deduction for gifts to charity does not justify such results, and it is suggested that the deduction be limited to a specified percentage of the decedent's estate.

See also Hearings on Revenue Revision of 1951 before the House Committee on Ways and Means, 82d Cong., 1st Sess., pt. 1, at 72 (1951) (discussion within Treasury of imposing 15 per cent limit on deduction for charitable bequests, but without reaching a conclusion).

² See H.R. 1040, 93d Cong., 1st Sess., 1973 ("Tax Equity Act of 1973"), summarized by Representative Corman, 119 Cong. Rec. 386 (1973).

See generally Locke, *The Estate Tax and Charitable Donations*, 20 Wayne L. Rev. 1227 (1974); Boskin, *Estate Taxation and Charitable Bequests*, Stanford University Center for Research in Economic Growth, Memorandum No. 180 (1974).—J. Pub. Econ.—(1976); Schaefer, *Charitable Transfers at Death Under the Federal Estate Tax* (1966) (Ph.D. dissertation, Columbia University); Myers, *Estate Tax Deduction for Charitable Benefits: Proposed Limitations* (1975) (memorandum submitted to Com-

mission on Private Philanthropy and Public Needs (the "Filer Commission")); Wagner, *Death, Taxes and Charitable Bequests: A Survey of Issues and Options* (1975) (memorandum submitted to the Filer Commission); McDaniel, *Study of Federal Matching Grants for Charitable Contributions* (1975) (memorandum submitted to the Filer Commission); Westfall, *Proposed Limitations on the Estate Tax Deduction for Charitable Transfers* (1975) (memorandum submitted to the Filer Commission); Westfall, *Revitalizing the Federal Estate and Gift Taxes*, 83 Harv. L. Rev. 986 (1970); McNees, *Deductibility of Charitable Bequests*, 26 Nat'l Tax J. 79 (1973).

In its final report, *Giving in America: Toward a Stronger Voluntary Sector* 151 (1975), the Filer Commission, one member dissenting, recommended that the deduction for charitable bequests be retained in its present form. A coalition of public interest, social action and volunteer groups that acted as advisors to the Filer Commission recommended the institution of a minimum estate tax, comparable to the minimum income tax, but did not suggest a rate or any other details. See Donec Group, *Private Philanthropy: Vital & Innovative? or Passive & Irrelevant?* 29 (1975).

³ C. Shoup, *Federal Estate and Gift Taxes* (Brookings Institution, 1966), regards the existing system of deducting the bequest "off the top" as wasteful, on the ground that decedents with large estates need little or no tax incentive to make small bequests to charity. This leads him to propose reversing the rates in computing the tax allowance for charitable bequests (e.g., a credit of 3 per cent of the first \$5,000 left to charity, 7 per cent of the next \$5,000, and so on up to 77 per cent of any amount over \$10 million).

See also McNees, *supra* note 2 (credit); McDaniel, *supra* note 2, and compare with Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?* 28 Tax L. Rev. 37 (1972).

⁴ For history, see 1 R. Paul, *Federal Estate and Gift Taxation*, ¶ 1.02 (1942); Eisenstein, *The Rise and Decline of the Estate Tax*, 11 Tax L. Rev. 223, 224 (1956).

⁵ See compilation of the state laws in *Hearings on the Revenue Act of 1918 before the House Committee on Ways and Means*, 65th Cong., 2d Sess., pt. 1, at 907 (1918).

⁶ The terminology was not as precise at that time. See S. Rep. No. 103, 65th Cong., 1st Sess. (1917) (1939-1 C. B. (Part 2) 65) (referring to the 1916 tax as "the inheritance tax levied by the National Government"). See also S. Rep. No. 793, 64th Cong., 1st Sess. (1916) (1939-1 C. B. (Part 2) 30) (referring to the 1916 tax as the "estate or inheritance tax").

⁷ See H.R. Rep. No. 922, 64th Cong., 1st Sess. (1916) (1939-1 C. B. (Part 2) 25):

Your committee deemed it advisable to recommend a Federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees. The Federal estate tax recommended [by the committee] . . . can be readily administered with less conflict than a tax based upon the shares.

⁸ Revenue Act of 1918, ch. 18, tit. IV, §403(a)(3), 40 Stat. 1057, 1098.

⁹ E. Griswold, *Cases and Materials on Federal Taxation* 1074 (6th ed. 1966).

¹⁰ See S. Rep. No. 617, 65th Cong., 3d Sess., 15 (1918) (1939-1 C. B. (Part 2) 127).

¹¹ *Id.*

¹² See H.R. Rep. No. 1037, 65th Cong., 3d Sess., 70-71 (1919) (1939-1 C. B. (Part 2) 151).

¹³ It may be argued that the beneficiaries of charitable institutions would not suffer, on balance, if charitable bequests were taxed, since the resulting reduction in charitable activities would be offset by an increase in government revenues and hence in public spending. But this argument requires heroic assumptions about the destination of the funds raised by taxing charitable contributions, disregards the

likelihood that charitable bequests will diminish by more than the revenue raised, and overlooks the desirability in a pluralistic society of strong nongovernmental social welfare and cultural activities.

¹⁴ Revenue Act of 1918, ch. 18, tit. IV, §403(a)(3), 40 Stat. 1057, 1098.

¹⁵ (1) The Revenue Act of 1932, §807, 47 Stat. 169, 282 (now §2055(c) of 1954 Code), overruling the decision in *Edwards v. Slocum*, 264 U.S. 61 (1924); and (2) the Tax Reform Act of 1969, 83 Stat. 487, introduced to eliminate abuses arising from the use of charitable remainder trusts. See Canon, *Charitable Remainder Trusts: A Study of Current Problems*, 1975 Brigham Young U. L. Rev. 49.

¹⁶ Int. Rev. Code of 1954, §170(b)(1)(individual donors); the limit is lower if the donees are outside the circle of "public" charities specified by Int. Rev. Code of 1954, §170(b)(1)(A). For corporations, the deduction is limited to 5 per cent of taxable income. Int. Rev. Code of 1954, §170(b)(2).

¹⁷ Int. Rev. Code of 1954, §170(b)(1)(C).

¹⁸ E. Griswold, *Cases and Materials on Taxation* 264 (1st ed. 1940).

¹⁹ E. Griswold, *supra* note 9, at 1076.

²⁰ Covey, Surrey and Westfall, *Perspectives on Suggested Revisions in Federal Estate and Gift Taxation*, 28 *Record of the Association of the Bar of the City of New York* 42, 47 (1973); Westfall, *Revitalizing the Federal Estate and Gift Taxes*, *supra* note 2, at 1002-06.

²¹ Approximately 5 per cent of the individual tax returns filed in 1972 claimed charitable deductions in excess of 10 per cent of adjusted gross income, and only 0.5 per cent claimed charitable deductions in excess of 30 per cent. Int. Rev. Service, *Statistics of Income, 1972, Individual Income Tax Returns* 111-12 (1974).

²² The existence of the charitable deduction, however, undermines the assumption that donating a dollar to charity generates as much satisfaction for the donor as spending the same dollar on himself. To use the terminology of the economist, the deduction has a "price effect," so that it "costs less" to donate a dollar to charity than to spend a dollar on a hobby or vacation. For this reason, if a taxpayer makes a charitable contribution of \$1,000, and thereby saves \$500 of taxes, it is far from clear that he gets a full \$1,000's worth of pleasure or satisfaction; that inference would be justified only if he would have made the contribution even if it had not been deductible. If repeal of the statutory deduction would have led him to spend part or all of the \$1,000 on himself, the theory that charitable contributions are indistinguishable from personal consumption would have to be scaled down or abandoned.

²³ The income tax's unlimited deduction for charitable contributions (the "Philadelphia nun" provision), *supra* note 17, was evidently designed for a taxpayer who took an oath of poverty on joining a religious order, to which she thereafter paid over all income from a trust of which she was the life beneficiary, but which could not be effectively assigned within the rule of *Blair v. Commissioner*, 300 U.S. 5 (1937), because of a spendthrift clause. See T. Hunter, *The Tax Climate For Philanthropy* 12 (1968). No doubt other taxpayers using this deduction lived well by dipping into their capital; those owning appreciated securities could, of course, donate the securities to charity without recognizing the capital gain, while living on their dividends and interest.

²⁴ S. Rep. No. 91-552, 91st Cong., 1st Sess., 70 (1969) (1969-3 C. B. 474).

²⁵ For my own effort to trace through the policy implications of this theory, see Bittker, *Federal Estate Tax Reform: Exemptions and Rates*, 57 A.B.A.J. 236 (1971).

²⁶ On taxing bequests as income to the recipient, see H. Simons, *Personal Income Taxation* 125-47 (1938); 3 *Canada—Report of the Royal Commission on Taxation*, ch. 17, 465-519 (1966); J. Pechman, *Federal Tax Policy* 186-87 (rev. ed. 1971) (gifts and bequests should "in theory" be taxed as income). On the taxation

of gifts and bequests as "accessions" to the recipient's wealth, see Rudick, A Proposal For An Accessions Tax, 1 *Tax L. Rev.* 25 (1945); Andrews, A Consumption-Type or Cash Flow Personal Income Tax, 87 *Harv. L. Rev.* 1113 (1974). See also W. Vickrey, Agenda for Progressive Taxation 224 (1947). While the proponents of these alternatives to the federal estate tax are not always explicit on the point, their proposals ordinarily contemplate exempting charitable recipients.

This focus on the recipient rather than on the donor can also be seen in the frequent use of term "windfall" to characterize gifts and bequests, and in proposals to tax the generation-skipping trust, which rest ultimately on the theory that a bequest of income to one generation with remainder to the next is enjoyed by both generations.

²⁷ Tax Reform Studies and Proposals, U.S. Treas. Dept., Joint Pub. House Comm. on Ways and Means and Sen. Comm. on Finance, 91st Cong., 1st Sess., pt. 3, at 381 (1969) (orphan children); Covey, Surrey and Westfall, *supra* note 20, at 44 (minor children and "actual dependents" of the decedent); Bittker, *supra* note 25, at 239.

²⁸ See Int. Rev. Service, Statistics of Income, 1972, Estate Tax Returns 1 (1974) (up from about 3 per cent 15 years ago).

²⁹ *Id.* at 2 (54,000 of 117,000 estate tax returns filed in 1972 were nontaxable).

³⁰ I discard, as wholly unpersuasive for charitable bequests of the magnitude we are discussing here, the possibility that the testator would have scaled down his lifetime consumption in order to enlarge the estate so that the same net amount would go to the charity after payment of the hypothetical tax.

³¹ Hearings on the subject of Tax Reform before the House Committee on Ways and Means, 91st Cong., 1st Sess., pt. 11, at 3978 (1969) (Statement of Jerome Kurtz). But see, Wicks and McDonald, Income Distribution of Death Bequest Recipients, 22 *Nat'l Tax J.* 408, 409 (1969), whose implications to the contrary must, in my view, be taken with caution. For one thing, the low income recipients of large bequests may well be minor children of wealthy tax parents, who are "poor" only in a technical sense.

³² See 1 R. Paul, *supra* note 4, ¶ 1.07 at 31:

Certainly it is a substantial, if not primary, motive of the American Federal estate tax to discourage excessive concentration of wealth. (Footnotes omitted).

³³ Wagner, *supra* note 2, at 18.

³⁴ For these methods of requiring each beneficiary of an estate to pay his own share of the death taxes, see 4 J. Mertens, *The Law of Federal Gift and Estate Taxation* §§30.12-30.19 (1959).

³⁵ Situations sometimes arise, however, where executors claim that transfers to charities made during the decedent's lifetime are includible in the decedent's gross estate as gifts made in contemplation of death. The resultant increase in the gross estate permits a larger maximum deduction for bequests to spouses, but does not increase the estate tax payable because the charitable deduction is increased by the same amount. See the summary of the "Tax Equity Act of 1973" by Representative Corman, *supra* note 2, at 392.

³⁶ In response to this the proposed "Tax Equity Act of 1973," *supra* note 2, §604(b), explicitly provides that contributions made during a decedent's lifetime (which would be deductible under §2055 of the 1954 Code if made at death) cannot be added back into the gross estate.

³⁷ Int. Rev. Code of 1954, §170(d).

³⁸ Westfall does not propose a gift tax limit. See Westfall, Revitalizing the Federal and Estate and Gift Taxes, *supra* note 2, at 1005.

³⁹ See Bittker, Should Foundations Be Third-Class Charities? in *The Future of Foundations* 132 (F. Heimann ed. 1973).